IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1783

ELSIE OAKLEY, Individually, and as Next Friend of Robert Oakley, a minor under the age of 14 years,

Petitioners,

vs.

ROGER (BOB) KNEFF,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. ————

ELSIE OAKLEY, Individually, and as Next Friend of Robert Oakley, a minor under the age of 14 years,
Petitioners,

vs.

ROGER (BOB) KNEFF,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioners, Elsie Oakley, Individually, and as next friend, Robert Oakley, a minor under the age of 14 years, pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the Commonwealth of Kentucky entered in this cause on February 3, 1976.

OPINION BELOW

This cause arose under a motion to dismiss the appeal to the Supreme Court of Kentucky on the grounds the Notice of Appeal was technically defective, which motion was sustained (App. p. 22a). Petitioner filed a timely Petion for Rehearing (App. p. 45a) which the Court de-

clared "Moot" (App. p. 45a). Neither has been reported. The number assigned in the Supreme Court of Kentucky is 92633.

JURISDICTION

The judgment of the Court below dismissing the Appeal was entered on February 3, 1976 (App. p. 22a) and the Petition for Rehearing was denied on March 17, 1976 (App. p. 45a).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3) and this Petition is filed within 90 days of said date.

QUESTIONS PRESENTED

I.

Whether, *as a matter of law,* the Notice of Appeal filed in this action, complies sufficiently with either CR 73.03 or the Rule pronounced by the Supreme Court of the United States relative thereto in the case of *Foman* v. *Davis,* to invoke Appellate jurisdiction which was declined by the Supreme Court of the Commonwealth of Kentucky and who thereby violated the rights to due process clause of the Constitution of Kentucky, Section 14, and also of the 14th Amendment, Section 1 relating to due process and the equal protection of the laws within their jurisdiction?

II.

Whether the Rule of substantive law pronounced in *Foman* v. *Davis,* 371 U.S. 178, 83 S.Ct. 227, by this Court, under the Supremacy clause of Article VI, is binding upon the Courts of the States including Kentucky under the 14th Amendment relating to due process and equal protection of the laws therein?

CONSTITUTIONS and STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:
Fourteenth Amendment, Section (1);
Article VI;

CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY:
Section 14;

KENTUCKY REVISED STATUTES:
446.008 (1);
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RCA 1.370

STATEMENT OF THE CASE

The instant case initially arose because of an alleged defective Notice of Appeal filed in Kenton Circuit Court on November 28, 1975. (App. p. 7a) The verbatim wording of said Notice is in the following words and figures:

> "Defendant, Roger (Bob) Kneff will take notice that Elsie Oakley, individually, and as next friend of Robert Oakley, her son and minor under the age of 14 years, is taking an appeal from the final order of this Court entered herein on November 24, 1975, wherein this Court over-ruled the motion and grounds for a new trial filed herein by plaintiffs' and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial."

A copy of the final order was mailed to Petitioners on November 13th, and was duly signed and filed in the office of the Clerk on the 14th of November, 1975, and ONLY ONE FINAL ORDER EXISTED IN THE CASE, which is the one entered on the 14th day of November, 1975, but which date was typed as the 24th, in error.

The Petitioners had designated the record on appeal, and had received an additional 60 days extension from the Circuit Court within which to lodge the record on appeal in the Appellate court, when Appellee filed a motion to dismiss under CR 75.10, on the grounds the Court had no jurisdiction under the policy previously adopted by the Court requiring STRICT compliance with CR 73.03, (the section relating to Notices of Appeal).

The lower court held on a motion to amend on its face, the notice of appeal, that "surplusage" vitated the notice of appeal in so many words. The Supreme Court of Kentucky ignored the word FINAL, and apparently substituted INTERLOCUTORY in its place. BOTH ARE INCORRECT. Surplusage is to be ignored, and "final order" is

defined under appealable orders in C.R. 54.01 (App. p. 51a) and ONLY ONE appealable exists in a case. C.R. 73.03 (App. p. 52a) does not require a date in the designation of the judgment on appeal, and FINAL ORDER certainly designates with certainty the judgment on appeal.

The Notice of Appeal was drafted with two things in mind:

1. To comply with C.R. 73.03 and invoke appellate jurisdiction, and
2. To state the point to Appellee that was going to be taken up on appeal, namely, whether or not sufficient evidence was produced to take the case to the jury, which was denied these Petitioners'.

There is no doubt Petitioners complied fully with the contents of the notice of appeal to invoke jurisdiction, and it can make no difference in that regard; regardless of whatever is added as surplusage cannot vitate the notice.

HOW THE FEDERAL QUESTION AROSE

The judge of the lower court erroneously entered a directed verdict in a last chance case involving Petitioner, a 9 year old boy who was crippled seriously in the accident. Motion and grounds for a new trial was filed and overruled. A Notice of Appeal was filed, the designation of the record on appeal was filed, and an extension of 60 days to lodge the record and to perfect the appeal was granted, when Appellee filed a motion to dismiss in the Supreme Court of Kentucky upon the grounds the Notice of Appeal was technically defective, in that the Notice of Appeal had dated the FINAL ORDER the 24th of November, 1975 whereas the date of the FINAL ORDER was November 14, 1975.

The case was never docketed in the Supreme Court, but on February 3, 1976, the Court entered an order forth-

with, dismissing the appeal, (App. p. 22a) apparently on the theory a court can look to its jurisdiction at any time. This being a final order, Petitioners filed a Petition for Rehearing under RCA 1.350 (a) within the time limit set under RCA 1.370, setting out therein specifically the rights of Petitioners under the 14th Amendment of the Constitution of the United States of their rights and privileges granted therein and of the Due Process clause and Equal Protection clauses contained therein (App. p. 30a) which the Court didn't think kindly of apparently, and called it "Moot". The entire record of the Supreme Court has been certified and filed with this Court.

REASONS FOR GRANTING THE WRIT

I.

While the Supremacy clause has been carried over to the 14th Amendment as to the first eight Amendments in criminal cases, one issue herein is whether or not a Rule of law decreed by this Court in a civil case, likewise is carried over under the Supremacy clause, and is therefore binding upon the State Courts is of National importance.

II.

Whether the Supreme Court of Kentucky, by judicial fiat, and over a period of years, can reduce its jurisdiction, and thereby confiscate Petitioners' rights of recovery in a civil action, is a case of first impression.

III.

The Notice of Appeal is legally sufficient, and the denial of jurisdiction under it, is of national importance, and in violation of Equal Protection clause of 14th Amend. (1).

I.

Among the privileges and immunities of citizenship is included the right of access to the courts, (*McKnett* v. *St. Louis S. F. R. Co.*, 292 U.S. 230, 78 L. Ed. 1227, 54 S. Ct. 690) for the purpose of bringing and maintaining actions (*Canadian N. R. Co.* v. *Egan*, 252 U.S. 553, 64 L. Ed. 713, 40 S. Ct. 402). This privilege includes the right to employ the usual remedies for the enforcement of personal rights (*Maxwell* v. *Bugbee*, 250 U.S. 525, 63 L. Ed. 1124, 40 S. Ct. 2) in actions of every kind – a right which cannot be abrogated or even suspended.

Here the Notice of Appeal speaks for itself, and the denial of jurisdiction when in fact and in law, the Court had jurisdiction, is to deny Petitioners their basic constitutional rights to Due Process and to Equal Protection of the laws of the Commonwealth of Kentucky and of the United States, and this Court held in the case of *Fiske* v. *State of Kansas*, 274 U.S. 380, 47 S. Ct. 655, that where necessary it would review the findings of facts by a State court where a Federal Right has been denied as the result of a finding shown by the record to be without evidence to support it. The assertion of Federal rights, when plainly and reasonably made, *as was done here*, is not to be defeated under the name of local practice (*Davis* v. *Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L. Ed. 143).

The power of the Supreme Court of Kentucky to determine the limits of the jurisdiction of its court and the character of the controversies which shall be heard therein, is subject to the limitations imposed by the Federal Constitution. (*McKnott* v. *St. Louis* N *S. F. R. Co.*, 292 U.S. 230, 233, 78 L. Ed. 1227, 54 S. Ct. 690).

The substantive law pronounced in Foman v. Davis (supra) relating to "technicalities" in pleading and also in the Notice of Appeal, complies entirely with part of our

Pledge of Allegiance to our great Country — "with liberty and justice for all," and justice is missing when a litigant loses on a technicality, his case. It also exposes counsel to a possible malpractice suit. It is therefore sound law for the Supremacy Clause of Article VI (2) to become effective and binding on the States, Foman v. Davis clearly gives this Court's interpretation of the 14th Amendment (1) relating to rights, privileges, and immunities, together with due process and equal protection of the law clauses contained therein.

II.

The Supreme Court of Kentucky has not only denied the Rule of law decided by this Court in *Foman* v. *Davis,* 83 S.Ct. 227, which is exactly in point with the issue herein; but has also, by judicial fiat, reduced its appellate jurisdiction which is the foundation of the dismissal of Petitioner's appeal, by changing from the doctrine of substantial compliance to their announced policy of *strict compliance* of the Notice of Appeal. (*Commonwealth of Kentucky* v. *Black,* (Ky) (1959) 329 SW 2nd 192; *Hawks* v. *Wilbert,* (Ky) (1961) 355 SW 2nd 655; *Hopkins* v. *Hilliard,* (Ky) (1969) 444 SW 2nd 130; *Rose Bowl Lanes* v. *City of Louisville,* (Ky) (1963) 373 SW 2nd 157; *McFerran* v. *Postal Service,* (Ky) (1966) 402 SW 2nd 83). This Court has previously decided that no Court may, by *judicial fiat,* change its jurisdiction. *Stoll* v. *Gottlieb,* 305 U.S. 137, 59 S.Ct. 171. The mandate of the Equal Protection clause of the 14th Amendment (1) must be complied with by the States, but here denied to Petitioners. (*Hill* v. *State of Texas,* 62 S.Ct. 1159, 316 U.S. 400, 86 L. Ed. 1559).

The Supreme Court of Kentucky has ignored the provisions of K.R.S. 446.080 (1), K.R.S. 447.151 (App. p. 49a), Constitution of Kentucky, Section 14 (App. p. 49a) and Civil Rules of Practice #1; all of which are a part of

due process of the Commonwealth of Kentucky, and which prohibit the reduction of jurisdiction in the manner in which it was done to the detriment of Petitioners.

III.

THE NOTICE OF APPEAL

AS FILED: C.R. 73.03

NOTICE OF APPEAL TO THE COURT OF APPEALS

"Defendant, Roger (Bob) Kneff will take notice that Elsie Oakley, individually, and as next friend of Robert Oakley, her son and minor under the age of 14 years, is taking an appeal from the final order of this Court entered herein on November 24, 1975, wherein this Court over-ruled the motion and grounds for a new trial filed herein by plaintiffs and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial."

"The notice of appeal shall specify the parties taking the appeal, and shall designate the judgment or part thereof appealed from. — "

It is evident that the Notice of Appeal filed herein meets all of the requirements of C.R. 73.03 for the following reasons:

1. The date, though erroneous and should be the 14th instead of the 24th, is not required under C.R. 73.03;
2. The FINAL ORDER does designate the order, and

it is defined in C.R. 54.02 (App. p. 51a) as the one appealed from; and

3. All language descriptive of any order not applicable may be rejected as surplusage, *Ekerson* v. *Ekerson,* 245 P. 1086.

4. The above Notice, after the final order, was solely designed to inform the Appellee of the point upon which the appeal was going to be taken, to-wit: whether or not sufficient evidence was introduced to take the case to the jury, and the "wherein" following the date refers to the final judgment only, and how this can be misconstrued, I am at a loss to say. That "surplusage" has been recognized in Kentucky as without legal effect, is found in the case of *Barnes* v. *Tipton,* 153 SW 2nd 940, 943. 287 Ky. 365.

CONCLUSION

The constitutional questions raised in this Petition are of immediate and critical importance, not only to the citizens of the Commonwealth of Kentucky, but also to the entire nation. Presently, over 50% of the States have adopted the Federal Rules of Civil Procedure, including Kentucky, who rejects the stare decisis promulgated by the Federal Courts in this cause, including the Rule of law decreed in *Foman* v. *Davis* (supra) thereby relegating the citizens of Kentucky to that of second class citizens. The writ of certiorari should be granted.

Respectfully submitted,

/s/ STUARD WEGENER
827 Wesley Drive,
Villa Hills, Ky. 41016
Phone (606) 341-2426
Counsel for Petitioners

APPENDIX

COURT OF APPEALS
COMMONWEALTH OF KENTUCKY

ELSIE OAKLEY, Individually and as next friend of ROBERT OAKLEY, a minor

Appellants,

vs.

ROGER (BOB) KNEFF

Appellee.

MOTION TO DISMISS APPEAL

(Filed January 12, 1976)

The defendant-appellee hereby moves this Court to dismiss the appeal from the Kenton Circuit Court, Fourth Division, # 27663, filed by the plaintiffs-appellants on the grounds that said plaintiffs-appellants have failed to comply with Civil Rule 73.03 in that the Notice of Appeal as filed is a Notice of Appeal from the Order of the Court entered on November 24, 1975, which in fact is the Order overruling the plaintiffs-appellants' motion and grounds for new trial in the Court below and is not an appeal from the Trial Order and Judgment entered by the Court below. Pursuant to the below cited authorities, the appeal is

therefore defective on the grounds that the Notice of Appeal is fatally defective and this is jurisdictional with this Court.

Pursuant to Rule 1.170 of the Rules of the Kentucky Court of Appeals, for the limited purpose of this motion, attached herewith and hereto are certified copies of those portions of the record necessary for this Court to decide the merits of this motion, namely:

1. Trial Order and Judgment of the Court below.

2. Order overruling plaintiffs-appellants' motion and grounds for new trial.

3. Notice of Appeal to the Court of Appeals.

AUTHORITIES:

Kentucky Rules of Civil Procedure 73.03

Hopkins v. *Hilliard,* Ky. 444 S.W.2d 130 (1969)

McFerran v. *Postal Service, Inc.,* Ky. 402 S.W.2d 83 (1966)

Rose Bowl Lanes, Inc. v. *City of Louisville,* Ky. 373 S.W. 2d 157 (1963)

Hawks v. *Wilbert,* Ky. 355 S.W.2d 655 (1961)

[CERTIFICATION OMITTED]

/s/ JAMES G. OSBORNE
O'HARA, RUBERG, CETRULO and OSBORNE
P. O. Box 187
600 Greenup Street
Covington, Kentucky 41012
Attorney for defendant-appellee

KENTON CIRCUIT COURT
FOURTH DIVISION

FILE No. 27663

ELSIE OAKLEY, et al,
Plaintiffs,

vs.

ROGER (BOB) NEFF,
Defendant.

TRIAL ORDER AND JUDGMENT

(Filed November 14, 1975)

This cause came on for trial on Thursday, November 6, 1975, at the hour of 9:30 a.m. The plaintiff, Elsie Oakley, individually and as next friend of Robert Oakley, was present in Court in person as was Robert Oakley, and represented by counsel, Honorable Stuard Wegener, and the defendant, Robert Neff, was present in Court individually and represented by counsel, Honorable James G. Osborne.

After voir dire examination, the Court impaneled a jury consisting of the following:

1. Willard Caddell
2. Donald Keeney
3. Ernest Baker
4. Theodore Adkins
5. Ruth Anderson
6. Thoburn Andrews

7. Earl Miller
8. William Steely
9. Richard Schneeman
10. Helen Geimeier
11. Dorothy Cartwright
12. Conrad Walls
13. Wanda Garriott

All jurors were present and sworn to try the issues involved in this case.

Opening statements were made by counsel for plaintiffs and defendant, following which the testimony of the plaintiff was begun and was not completed at the hour for luncheon recess. The Court admonished the jury and adjourned for lunch at 11:50 a.m. and at 1:15 p.m. the jury returned and Court reconvened.

Following the lunch recess, the testimony of the plaintiff was continued but was not completed at the hour for evening recess. Thereupon, at 3:25 p.m., the Court admonished the jury and adjourned for the evening. The Court announced that they should return at 9:30 a.m. the morning of the 7th of November, 1975.

On the morning of the 7th of November, 1975, at 9:30 a.m. all parties again were present in Court ready to proceed with the evidence. The plaintiffs resumed testimony on their behalf. This testimony was completed and the plaintiffs rested.

Thereupon, in chambers out of the hearing of the jury, the plaintiffs moved the Court for a directed verdict in plaintiffs' favor. Said motion was overruled. The defendant then moved the Court to direct a verdict on his behalf, ruling that the plaintiff was contributorily negligent as a matter of law, and further that the defendant was not negligent as a matter of law, and that the doctrine of last clear chance was inapplicable. Upon due deliberation,

the Court sustained said motion, ruling that the plaintiff was contributorily negligent as a matter of law and further that the Court did not have to decide the issue of the lack of negligence on the part of the defendant as under the law of Kentucky, no case for last clear chance had been shown and that therefore, the defendant was entitled to a directed verdict.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that pursuant to this Court's ruling, the complaint of the plaintiffs is hereby dismissed, with prejudice, at the cost of the plaintiffs.

/s/ JAMES J. GILLIECE
JUDGE

[CERTIFICATION OMITTED]

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

ORDER

(Filed November 24, 1975)

This matter coming on for hearing pursuant to the motion and grounds for new trial filed on behalf of the plaintiffs herein and the Court having heard the arguments of counsel and being in all respects duly and sufficiently advised,

IT IS HEREBY ORDERED AND DIRECTED that said motion be and the same hereby is overruled.

/s/ JAMES J. GILLIECE
JUDGE

[CERTIFICATION OMITTED]

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

NOTICE OF APPEAL TO THE COURT OF APPEALS

(Filed November 28, 1975)

Defendant, Roger (Bob) Kneff will take notice that Elsie Oakley, Individually, and as next friend of Robert Oakley, her son and minor under the age of 14 years, is taking an appeal from the final order of this Court entered herein on November 24, 1975, wherein this Court overruled the motion and grounds for a new trial filed herein by plaintiffs' and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial.

/s/ STUARD WEGENER
COUNSEL FOR PLAINTIFFS
827 Wesley Drive,
Villa Hills, Ky. 41016

[CERTIFICATION OMITTED]

COURT OF APPEALS OF KENTUCKY

[TITLE OMITTED]

MOTION TO ABATE UNDER RULE 60.04

(Filed January 10, 1976)

Comes the Plaintiffs' Appellants Elsie Oakley, et al., and moves the Court to abate the Motion to Dismiss filed herein by Defendant-Appellee upon the grounds that a Motion to correct on its face Plaintiffs' Notice of Appeal which was duly filed in Kenton Circuit Court on January 12, 1976 under CR 60.02 (1) in which Plaintiffs'-Appellants inadvertantly typed the 24th day of November, 1975 instead of the 14th day of November, 1975 on the Notice of Appeal as the date of the final adjudicative order in this cause, this being a palpable error affecting the substantial rights of Plaintiffs'-Appellants as defined in CR 61.02; a Certified copy of the Motion and Affidavit filed in Kenton Circuit Court is attached hereto and marked as Exhibit A, both of which are incorporated herein by reference; while Appellants have until on or about March 25, 1975 to Docket their Appeal in this Court.

WHEREFORE, Plaintiffs'-Appellants pray said proceedings be abated in accordance with CR 60.04, until a final determination by Kenton Circuit Court as set out above.

/s/ STUARD WEGENER
Counsel for Plaintiffs'
Appellants
827 Wesley Avenue,
Villa Hills, Ky. 41016

[CERTIFICATION OMITTED]

EXHIBIT "A"

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

MOTION FOR LEAVE TO CORRECT TYPOGRAPHICAL ERROR IN NOTICE OF APPEAL UNDER CR 60.02 (1) PRIOR TO DOCKETING IN COURT OF APPEALS

(Filed January 12, 1976)

Comes Plaintiffs', thru counsel, and moves the Court to correct typographical error in Notice of Appeal in that in the Notice of Appeal the date of the judgment referred to therein under CR 9.05 was inadvertantly typed as November 24, 1975, whereas the correct date of the final order as stated therein was typed as November 24, 1975 while the final order was in fact the date of November 14, 1975 filed and entered by the Clerk, and the date of November 14, 1975 was intended to be stated therein as the date of the final order.

Plaintiffs' attach their affidavit in support hereof.

WHEREFORE, Plaintiffs' Elsie Oakley, et al., pray for leave to amend the Notice of Appeal on its face by changing said date on their Notice of Appeal from November 24, 1975 to November 14, 1975, and in all other respects affirm the Notice of Appeal in its entirety.

/s/ STUARD WEGENER
Counsel for Plaintiffs
827 Wesley Drive,
Villa Hills, Ky.

AFFIDAVIT

(Filed January 12, 1976)

COMMONWEALTH OF KENTUCKY,)
) SCT
COUNTY OF KENTON,)

Affiant, Stuard Wegener, after first being duly deposed and sworn, states:

1. That he composed and typed the Notice of Appeal on behalf of his clients;

2. That the reference to the date of the final adjudicative order in said Notice of Appeal is in compliance with CR 9.05;

3. That CR 54.01 defines a final order for appeal;

4. That under CR 73.03, only that part of the judgment that was stated in the Motion and Grounds for a New Trial was reserved for review on Appeal, to-wit: the directed verdict against Plaintiffs.

5. That the order over-ruling the Motion and Grounds for a New Trial is a interlocutory and not a final order under CR 73.01; and that it is only a coincidence that the order over-ruling the Motion and Grounds is the date typed on the Notice of Appeal.

6. That under CR 60.01, 60.02, 60.03, 60.04 this Court has exclusive jurisdiction to grant leave to correct on its face, plaintiffs' unilaterial error in the Notice of Appeal.

Further affiant sayeth not.

/s/ STUARD WEGENER
Counsel for Plaintiffs'
827 Wesley Drive,
Villa Hills, Ky.

[NOTICE AND CERTIFICATE OMITTED]

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION TO ABATE

(Filed January 22, 1976)

The defendant-appellee in response to the motion filed on behalf of the plaintiffs-appellants to abate pursuant to Rule 60.04 states as follows:

1. That the plaintiffs-appellants have requested this Court to abate ruling on the defendant-appellee's motion to dismiss the appeal on the grounds that a motion has been filed with the Kenton Circuit Court, Fourth Division, asking that Court to correct an error in the Notice of Appeal. A copy of the motion for leave to correct typographical error in Notice of Appeal under Civil Rule 60.02 (1) is attached to this response. Additionally, attached to the response is the reply of the defendant-appellee to said motion. Both said motion and reply have been certified by the Clerk of the Kenton Circuit Court according to the rules of this Court.

2. That by reference to the Notice of Appeal which has previously been filed with this Court properly certified by the Clerk of the Kenton Circuit Court, it is patently evident that there was no typographical error as the plaintiffs-appellants specifically referred to the order overruling the motion and grounds for new trial and it is therefore obvious since the date referred to is the same date of that order and since plaintiffs-appellants mentioned specifically the order overruling the motion and grounds for new trial from which he has appealed as being the order from which

he has appealed, there could not possibly have been a typographical error.

3. Under Rule 60.04 the rule upon which plaintiffs-appellants rely, the rule is applicable only when an appeal is pending in this Court. The plaintiffs-appellants having failed to properly perfect the appeal, a matter which is jurisdictional, there is no appeal pending in this Court and the matter merely stands in this Court pursuant to the motion of defendant-appellee for a dismissal of the Notice of Appeal.

4. Plaintiffs-appellants cited KCR 61.02 in reliance upon the fact that palpable error did occur and that he has the right to have this reviewed by the Kenton Circuit Court. KCR 61.02 provides that the only basis upon which such palpable error could be considered by the lower court is by plaintiffs-appellants' motion for new trial. It further provides that it can be considered by this Court on appeal. If there was any palpable error, it was the plaintiffs-appellants' own doing. Regardless of this, the matter is not properly before the Kenton Circuit Court, as the Kenton Circuit Court does not have jurisdiction of this matter once the Notice of Appeal has been filed and the time has run therefor. Further, the Kenton Circuit Court cannot consider the matter because the only basis upon which it can do so is upon motion for new trial pursuant to 61.02, and finally, there is no appeal pending before this Court, but merely a motion to dismiss the Notice of Appeal filed by plaintiffs-appellants on the basis that the plaintiffs-appellants failed to satisfy the jurisdictional requirements of this Court in perfecting an appeal.

WHEREFORE, the defendant-appellee requests this Court to disregard the motion to abate; sustain our motion

to dismiss this appeal and to order that dismissal as quickly as possible.

Respectfully submitted,

/s/ JAMES G. OSBORNE
O'HARA, RUBERG, CETRULO
AND OSBORNE
P.O. Box 187
600 Greenup Street
Covington, Kentucky 41012

[CERTIFICATION OMITTED]

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

REPLY TO MOTION FOR LEAVE TO CORRECT TYPOGRAPHICAL ERROR IN NOTICE OF APPEAL UNDER CIVIL RULE 60.02 (1)

(Filed January 13, 1976)

The defendant, Roger (Bob) Kneff, by counsel, for his reply to the motion of the plaintiff herein as above stated, states as follows:

1. That the appeal has been docketed with the Court of Appeals pursuant to the Motion to Dismiss Appeal, filed for and on behalf of this defendant.

2. That this Court is without jurisdiction to hear or decide any motion once the appeal has been docketed.

3. That as a matter of fact no clerical error was permitted by plaintiffs' attorney as the Notice of Appeal very clearly states that the plaintiffs are taking an appeal "from the final order of this Court entered herein on November 24, 1975, *wherein this Court overruled the motion and grounds for new trial filed herein by plaintiffs and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial.*" Therefore, it is abundantly clear that plaintiffs' attorney was referring to the Order overruling the motion and grounds for new trial and was not referring to the Judgment entered herein.

4. A Notice of Appeal from an Order overruling a motion and grounds for new trial is improper as such an

Order is not a final order and is not appealable as such. Further, the filing of the Notice of Appeal within the time limit prescribed is mandatory and jurisdictional and if a party fails to prescribe to the requirements of law, said Notice of Appeal is defective. See *Hardin* v. *Waddell*, Ky. 316 S.W.2d 367 (1958); *Kentucky Rules of Civil Procedure* 73.03; *Hopkins* v. *Hilliard*, Ky. 444 S.W.2d 130 (1969); *McFerran* v. *Postal Service, Inc.*, Ky. 402 S.W.2d 83 (1966); *Rose Bowl Lanes, Inc.* v. *City of Louisville*, Ky. 373 S.W.2d 157 (1963); *Hawks* v. *Wilbert*, Ky. 355 S.W.2d 655 (1961).

5. Further, even the Court of Appeals, or as now designated, the Supreme Court of Kentucky, does not have authority under Civil Rule 60.02, or any other rule, to change the Notice of Appeal or to permit such change. See additionally *United Bonding Insurance Company* v. *Commonwealth of Kentucky*, Ky. 461 S.W.2d 535 (1970).

/s/ JAMES G. OSBORNE

O'HARA, RUBERG, CETRULO
AND OSBORNE

P.O. Box 187
600 Greenup Street
Covington, Kentucky 41012

[CERTIFICATION OMITTED]

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

MOTION

(Filed February 3, 1975)

The defendant-appellee, by and through his attorney, hereby moves this Court to note the filing in the Kenton Circuit Court, Fourth Division, of an Order of that court overruling the plaintiff-appellants' motion to correct a typographical error in the Notice of Appeal. A copy of that Order is attached duly certified by the Clerk of the Kenton Circuit Court.

Further, this defendant-appellee moves this Court to now rule on the motion of this defendant-appellee for a dismissal of this appeal on the grounds cited in the original motion filed by this defendant-appellee and further on the grounds that the Order overruling the plaintiffs-appellants' motion to correct typographical error in the Notice of Appeal having been overruled, makes said motion to abate moot.

[CERTIFICATION OMITTED]

/s/ JAMES G. OSBORNE

O'HARA, RUBERG, CETRULO AND OSBORNE

P.O. Box 187

600 Greenup Street

Covington, Kentucky 41012

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

ORDER

(Filed January 27, 1976)

The motion of the Plaintiffs for leave to correct a typographical error in Notice of Appeal is OVERRULED.

Memorandum

The Notice of Appeal filed November 28, 1975, clearly states that the plaintiff is "taking an appeal from the final order of this court entered herein on November 24, 1975, wherein this Court overruled the motion and grounds for a new trial . . ."

If the Notice of Appeal had stopped with the date, perhaps some argument might be made for Plaintiffs' position. But, Plaintiffs specifically refer to the order of November 24, 1975, overruling Plaintiffs' motion and grounds for a new trial.

In view of this, Plaintiffs' motion to correct a typographical error is without merit.

/s/ JAMES J. GILLIECE
JUDGE

Copies:

Hon. S. Wegener
Hon. J. G. Osborne

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

NOTICE OF MOTION

(Filed February 18, 1976)

The defendant-appellee, hereby moves this Court to note the filing of the Order of the Supreme Court of Kentucky entered on February 3, 1976, denying the appellant's motion to abate and dismissing the appeal of the appellant, a copy of said Order being attached to this Motion.

Further, this appellee moves this Court to order that all costs attendant to the dismissal of this appeal and all costs incurred since the entry of the final Judgment herein be assessed against the appellant and further order that a rule be issued to be served upon the appellant for said appellant to show cause why she should not be held in contempt of this Court for failure to pay all costs up to the time of the final Judgment herein and all costs incurred since the date of Judgment up to the date of the hearing on this Motion.

Further, the defendant-appellee moves this Court to issue an order ruling that all matters in controversy by and between the parties have been adjudicated by that Order dated February 3, 1976, of the Supreme Court of Kentucky on the grounds that the Motion to abate and the response filed by the defendant-appellee to the said Motion to abate in the Supreme Court of Kentucky, carried with it all issues relative to this Court's Order overruling the Motion of the plaintiff-appellant to correct a typographical error and further on the grounds that the Notice of Appeal filed from this Court's Order overruling said

Motion is not a final or appealable Order under Civil Rule 54.01.

NOTICE

Notice is hereby given that the above motion will be brought on for hearing before the Kenton Circuit Court, Fourth Division, on the 23rd day of February, 1976, at 9:30 a.m. or as soon thereafter as counsel may be heard.

[CERTIFICATION OMITTED]

/s/ JAMES G. OSBORNE

O'HARA, RUBERG, CETRULO AND OSBORNE

P.O. Box 187
600 Greenup Street
Covington, Kentucky 41012

KENTON CIRCUIT COURT
FOURTH DIVISION

NO. 27663

ELSIE OAKLEY, INDIVIDUALLY AND AS
NEXT FRIEND OF ROBERT OAKLEY, A MINOR,
PLAINTIFF-APPELLANT,

vs.

ROGER (BOB) KNEFF,
DEFENDANT-APPELLEE.

ORDER

(Filed ————)

This matter coming on for hearing pursuant to the motion of the defendant-appellee to note the filing of the Order of the Supreme Court of Kentucky entered on February 3, 1976 and further upon the motion of the defendant-appellee to order that all costs be paid by the plaintiff-appellant and further that the Court issue an Order ruling that all matters in controversy have been adjudicated by the Supreme Court of Kentucky and the Court being in all respects duly and sufficiently advised,

IT IS HEREBY ORDERED AND DIRECTED:

(1) That the motion to note the filing of the Order of the Supreme Court of Kentucky entered on February 3, 1976 be and the same hereby is sustained.

(2) That the plaintiff-appellant shall pay all costs of

this matter and any costs incurred up to and including the within judgment shall be forthwith paid within ten (10) days of the date of this Order or a rule shall immediately issue returnable at the convenience of the Court directing that said costs be paid.

(3) That the costs from the date of judgment up to and including this motion and the ruling thereon shall be paid by the plaintiff-appellant.

This Court further finds that the Order of the Supreme Court of Kentucky entered on February 3, 1976 does in fact adjudicate all matters in controversy by and between the parties and that the Notice of Appeal filed by the plaintiff-appellant has no merit and is therefore dismissed and stricken from the record, and the motion of the defendant-appellee is sustained.

/s/ JAMES J. GILLIECE
JUDGE

[CERTIFICATION OMITTED]

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

Appeal From Kenton Circuit Court
Honorable James J. Gilliece, Judge

ORDER DENYING MOTION TO ABATE AND DISMISSING APPEAL

The appellant's motion to abate is denied.
On Appellee's motion the appeal is dismissed.

Palmore, Stephenson, Jones, and Clayton, JJ., sitting. All concur.

Entered February 3, 1976.

/s/ SCOTT REED
Chief Justice

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

MOTION TO DISMISS APPEAL

(Filed February 20, 1976)

The appellee, Roger (Bob) Kneff, hereby moves this Court to dismiss the appeal from the Kenton Circuit Court, Fourth Division, No. 27663, filed by the appellant, Elsie Oakley, Individually and as next friend of Robert Oakley, a minor, on the grounds that the appellant has since the entry of this Court Order denying motion to abate and dismissing appeal filed a Notice of Appeal to the Supreme Court of Kentucky from the Order entered on January 27, 1976 by the Kenton Circuit Court, Fourth Division, overruling the Motion of the appellant to correct a typographical error in the original Notice of Appeal filed in this Court and that such Notice of Appeal is not an appeal from an appealable judgment or final Order as defined in Civil Rule 54.01 and the cases cited thereunder in Judge Clay's commentaries of Volume 7 of Kentucky Practice and further on the grounds that this Court by its Order denying the motion to abate and dismissing the appeal has adjudicated all issues and the rights of this appellant and necessarily has taken into consideration the Motion of the appellant to correct the typographical error. Further, the appellee cites to the Court's attention the case of *Maslow Cooperage Corporation* v. *Jones,* Ky. 316 S.W.2d 860 (1958).

Pursuant to Rule 1.170 of the Rules of Kentucky Court of Appeals, for the limited purpose of this motion, attached herewith and hereto are certified copies of those portions of the record necessary for this Court to decide the merits of this Motion, namely:

1. Notice of Appeal to the Supreme Court of Kentucky filed by the appellant.

2. The Order of the Kenton Circuit Court, Fourth Division, overruling the Motion of the appellant to correct a typographical error in the original Notice of Appeal.

3. Re-Designation of Record on Appeal filed by appellant.

4. Further, the appellee cites the Court's attention to the previous Motions and documents filed therewith in this Court.

Further, the appellee moves that this Court issue an Order requiring the appellant to pay all costs attendant to both Notices of Appeal filed by the appellant in this Court, directing that the appellant reimburse the appellee for costs and expenses incurred in dismissing this appeal.

MEMORANDUM

The Trial Order and Judgment was entered in this case by the Kention Circuit Court on November 14, 1975. Subsequent to that a Motion and Grounds for New Trial was filed on behalf of the plaintiffs below and that Motion was overruled on the 24th day of November, 1975. The appellant then filed a Notice of Appeal to the Court of Appeals on November 28th of 1975. Following this, the appellee then filed a Motion to dismiss the appeal, having certified that said Motion was mailed to all parties concerned on the 6th day of January, 1976. On the 12th day of January, 1976, the appellant filed in the Kenton Circuit Court, Fourth Division, a Motion for leave to correct a typographical error in the Notice of Appeal. On the 14th day of January, 1976, appellant's counsel certified as filing in this Court a Motion to abate under Rule 60.04.

The appellee then certified as mailing on the 19th day of January, 1976, a response to plaintiff-appellant's motion to abate, said response being filed in the Supreme Court of Kentucky. This Court then entered its Order denying the Motion to abate and dismissing the appeal on February 3, 1976. Following this, on the 10th day of February, 1976, the appellant filed another Notice of Appeal to the Supreme Court of Kentucky. The Kenton Circuit Court overruled the Motion for leave to correct a typographical error and that Order was entered on January 27, 1976. On the 12th day of February, 1976, the appellant then filed a Re-Designation of Record on Appeal. This Motion now stands before this Court on the Motion of the appellee to dismiss the appeal filed through the new Notice of Appeal mentioned above as having been filed on the 10th day of February, 1976, in the Clerk's office of the Kenton Circuit Court.

Under the definition as found in Civil Rule 54.01, it is very clear that this is not an appealable order as this does not adjudicate all of the rights of the parties. It is even more clear that the appeal as noticed from the Order overruling the Motion of the plaintiff-appellant to correct a typographical error is not an appealable Order on the grounds that all matters in controversy and all issues before the Kenton Circuit Court and the Supreme Court of Kentucky were adjudicated by this Court's Order entered on February 3, 1976. The Court's attention is likewise directed to the case of *Maslow Cooperage Corporation* v. *Jones,* Ky. 316 S.W.2d 860 (1958), a case which the Court of Appeals of Kentucky decided and which has never been overruled, wherein this Court held that even if there was an omission from a Judgment, and even if such omission could be construed as a clerical mistake which could be corrected under the Court Rules, the time for taking the

appeal from the original Judgment had long since expired and the correction of that mistake could not avail the party since the correction of the Judgment could not operate to revitalize the Judgment in such a way as to start a new running of the period for appeal. It is therefore respectfully requested that this Court dismiss the appeal taken by this appellant as noted by the Notice of Appeal filed by him in the Kenton Circuit Clerk's office on February 10, 1976, for the above reasons.

It is further respectfully requested that this Court grant to the appellee that the appellant pay all costs attendant to the filing of these Motions in dismissing the appeals.

/s/ JAMES G. OSBORNE

O'HARA, RUBERG, CETRULO
AND OSBORNE

P.O. Box 187
600 Greenup Street
Covington, Kentucky 41012

[CERTIFICATION OMITTED]

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

RE-DESIGNATION OF RECORD ON APPEAL

(Filed February 12, 1976)

The Appellee, Roger (Bob) Kneff, will take notice that the Appellants, Elsie Oakley, et al., are re-designating their record on appeal from the Notice of Appeal filed February 10, 1976 from final order filed in this Court persuant to motion under CR 60.02 which was denied on January 27, 1976, as follows:

1. All pleadings, motions, orders, briefs, depositions, or any other writing now in your file in this case;
2. The complete Bill of Evidence produced at the trial, including that in chambers out of the hearing of the jury, including all exhibits admitted or tendered into evidence.

/s/ STUARD WEGENER
Counsel for Appellants

827 Wesley Drive,
Villa Hills, Ky. 41016

[CERTIFICATION OMITTED]

KENTON CIRCUIT COURT
FOURTH DIVISION

[TITLE OMITTED]

NOTICE OF APPEAL TO THE SUPREME COURT OF KENTUCKY

(Filed February 10, 1976)

The defendant Roger (Bob) Kneff will take notice that Plaintiffs' Elsie Oakley, Individually and as next friend of Robert Oakley, a minor under the age of 14 years, by this present is taking an appeal of the order entered herein on January 27, 1976 to the Supreme Court of Kentucky on the ground that the Court abused its discretion in overruling Plaintiffs' motion to correct a typographical error in the Notice of Appeal in this cause; a copy of said order is attached hereto and incorporated by reference.

/s/ STUARD WEGENER
Counsel for Plaintiffs'

827 Wesley Drive,
Villa Hills, Ky. 41016

[CERTIFICATION OMITTED]

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

EX PARTE MOTION FOR LEAVE TO FILE ZEROXED COPIES IN LIEU OF PRINTED UNDER R.C.A. 1.200 (e)

(Filed February 24, 1976)

Comes Appellants' Elsie Oakley, et al., and moves the Court for leave to file zeroxed copies in lieu of printed copies under R.C.A. 1.200 (e) upon the ground of undue financial hardship and a shortage of time.

/s/ STUARD WEGENER
Counsel for Appellants'

827 Wesley Drive,
Villa Hills, Ky. 41016

[CERTIFICATION OMITTED]

SUPREME COURT OF KENTUCKY

ELSIE OAKLEY, INDIVIDUALLY, AND AS NEXT FRIEND OF ROBERT OAKLEY, A MINOR,
Appellants,

vs.

ROGER (BOB) KNEFF,
Appellee.

Appeal From Kenton Circuit Court

PETITION FOR REHEARING BY APPELLANTS

(February 24, 1976)

Respectfully submitted:

/s/ STUARD WEGENER
Counsel for Appellants
827 Wesley Drive,
Villa Hills, Ky. 41016

[CERTIFICATION OMITTED]

[TABLE OF CONTENTS AND AUTHORITIES OMITTED]

[TITLE OMITTED]

Appellants, Elsie Oakley, Individually and as next of Robert Oakley, a Minor, now petitions this Court in that it overlooked a controlling material fact in the record; has overlooked a controlling statute and decisions and has misconceived the law applicable to the Order entered herein on February 3, 1976, a copy of which is attached hereto and identified as "Exhibit A", all of which unless corrected by this Court violates Appellants rights guaranteed them under Section 1 of the Fourteenth Amendment of the Constitution of the United States, in the following respects, to-wit:

1. This Court was without jurisdiction to enter the order, in that the Appellee brought the proceedings under C.R. 75.10 and R.C.A. 1.170, and at no time was the case docketed to invoke the jurisdiction of this Court as expressly required under C.R. 75.10, and R.C.A. 1.170 can only be used for INTERMEDIATE orders and not for final orders as entered herein, the result being two defects in the jurisdictional aspects of this Court, either of which is fatal.

2. The Notice of Appeal filed in Kenton Circuit Court fully complies with C.R. 73.03 without correction on its face, in that it specifically designated the FINAL ORDER being appealed from, and there was only one final order and that was dated November 14, 1975 which was erroneously typed as November 24, 1975, and the balance of the Notice of Appeal was merely designating the point being relied upon solely on the appeal, being the directed verdict which

was put in issue under the Motion and Grounds for a New Trial, and which is mere surplusage in so far as meeting the requirements of C.R. 73.03 to invest this Court to hear and determine the Appeal, and this Court should reconsider their holding on this issue of sufficiency.

3. This Court by judicial fiat has reduced their jurisdiction under C.R. 73.03 from that of substantial compliance to strict compliance, which is apparently your holding in this cause, with the result that Appellants such as these Appellants are discriminated against in favor of those who passed under the same C.R. 73.03 but with substantial compliance only. This results in the failure of Equal Enforcement of the Law under the Fourteenth Amendment as to these Appellants. Further, such a change is contrary to the intent of C.R. 1 and the Stare Decisis of this Commonwealth for many years was that of substantial compliance and is also contrary to a long line of Federal Decisions on this point under exactly the same Rule, to-wit: F.R.C.P. 73. (b). C.R. 73.03 could be amended by this Court if it so desired to bring within the Rule the strict compliance doctrine for all to see and notice and everyone would have the benefit of equal protection of the law and due process thereby. We believe that Appellate legislation violates Section 110 of the Constitution of the Commonwealth of Kentucky and the 14th Amendment of the Constitution of the United States.

WHEREFORE, Appellants pray this Petition for Rehearing be sustained, that this Court set aside and hold for naught the Order of February 3, 1976, and to reinstate the Notice of Appeal in this cause, and all other proper relief.

/s/ STUARD WEGENER
Counsel for Plaintiffs'-
Appellants

II

STATEMENT OF QUESTIONS PRESENTED:

1. May a final order by obtained from this Court without formal docketing?
2. Is a designation of a FINAL ORDER in the notice of appeal under C.R. 73.03 compliance with the requirements of designation under C.R. 73.03?
3. Can C.R. 73.03 be changed by judicial fiat from substantial compliance to strict compliance without amendment without violating the Fourteenth Amendment, Section 1?

III

STATEMENT OF THE CASE

Appellants received an adverse directed verdict under the Last Chance Doctrine which became a final adjudicative order on November 14, 1975. Motion and Grounds for a new trial reserved the sole issue upon appeal to the directed verdict only upon the grounds there was more than sufficient evidence to take the case to the jury, which was overruled on November 24, 1976. Notice of Appeal was filed on November 28, 1975, which says:

> "Defendant, Roger (Bob) Kneff will take notice that Elsie Oakley, Individually, and as next friend of Robert Oakley, her son and minor under the age of 14 years, is taking an appeal from the final order of this Court entered herein on November 24, 1975, wherein this Court over-ruled the motion and grounds for a new trial filed herein by plaintiffs' and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial."

On December 10, 1975, with leave of Court, Appellant filed designation of entire record, and thereafter an extension of time to lodge the record on appeal was extended to March 28, 1976, being 120 days from date of Notice of Appeal.

On January 6, 1976, a motion under C.R. 75.10 to dismiss for lack of the Notice of Appeal to recite the date of the 14th of November, 1975, being the date of the final order which was sustained and the appeal dismissed by this Court on February 3, 1976. We filed motion to correct on its face, the typographical error from 24th to 14th, under C.R. 60.02, and a motion to abate in this Court under C.R. 60.04 which apparently was ignored.

IV.

ARGUMENT

1.

C.R. 75.10 says in part "a party desires to docket the appeal in order to make in the Court of Appeals a motion for dismissal, —

> R.C.A. 1.170 says: "No motion for an intermediate order under C. R. 75.10 or R.Cr 12.02 shall be entertained until the movant has filed in this Court a certified copy of the judgment appealed from and of the notice of appeal, and a copy of such portion of the record or proceedings below as is needed for the purpose of the motion."

Under the express provisions of C.R. 75.10 DOCKETING is required for a motion for dismissal, that being a FINAL ORDER, is not an intermediate order under R.C.A. 1.170, and is just as jurisdictional as the notice of appeal under

Appellate procedure, and without docketing the court is without jurisdiction to enter a final order of dismissal. Here there was no docketing or any attempt at docketing, hence no jurisdiction.

2.

As this Court can see from the entire notice of appeal set out at page 33a hereof, except for the technicality of typing the 24th for the 14th, the notice is far more than adequate. Seizing upon this technicality, Appellee had a glad hand in Kenton Circuit Court just as he had on his motion for directed verdict, and to attempt to confiscate Appellants rights thru such a error can only be accomplished after the Fourteenth Amendment is repealed. The Supreme Court of the United States put this question very aptly in the case of *Foman* v. *Davis,* 83 S.Ct. 227 (1962) at page 229:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson,* 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2nd 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1."

A notice of appeal designating as the judgment appealed from the order overruling a motion for a new trial has been regarded as applying to the judgment theretofore entered, which was the only appealable judgment in the case. See: *Wilson* v. *Southern R. Co.,* (CCA 5) 147 F (2nd) 708.

A MISTAKE OF A DAY IN THE DESIGNATION OF THE DATE OF ENTRY OF A JUDGMENT IS IMMATERIAL: *Porter* v. *Borden's Dairy,* (CCA 9) 156 F (2nd) 798.

3.

To legislate by judicial fiat is to conceal from many attorneys who do not either take or be able to read everything that he would like to read like the advance sheets, etc., and become an unwary victim of a change in this manner. He also might be subject to malpractice suits as a result. Jurisdiction must be in black and white in proper order for all to see and to follow, not hidden away in a decided case or cases.

Respectfully submitted:

/s/ STUARD WEGENER
Counsel for Appellants
827 Wesley Drive,
Villa Hills, Ky. 41016

APPELLANT EXHIBIT "A"

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

Appeal From Kenton Circuit Court
Honorable James J. Gilliece, Judge

ORDER DENYING MOTION TO ABATE AND DISMISSING APPEAL

The appellant's motion to abate is denied.
On Appellee's motion the appeal is dismissed.
Palmore, Stephenson, Jones, and Clayton, JJ., sitting.
All concur.

Entered February 3, 1976.

/s/ SCOTT REED
Chief Justice

SUPREME COURT OF KENTUCKY

[TITLE OMITTED]

OBJECTION TO EX PARTE MOTION FOR LEAVE TO FILE XEROX COPIES IN LIEU OF PRINTED BRIEF UNDER RCA 1.200 (E) AND MOTION TO STRIKE PETITION FOR REHEARING BY APPELLANTS, AND SUPPLEMENTAL MEMORANDUM TO PREVIOUSLY FILED MOTION TO DISMISS APPEAL

(Filed March 15, 1976)

The appellee, Roger (Bob) Kneff, hereby objects to the ex parte motion for leave to file xerox copies in lieu of printed brief under RCA 1.200 (E) on the grounds that under that provision of the Court's rule, it is necessary that the parties so moving show the ground of undue influence or other hardship. The appellants have shown no such undue hardship other than the mere assertion thereof of undue financial hardship and a shortage of time. There is no affidavit filed of record in support of this ex parte motion, nor is there any other evidence indicating that there is in fact undue financial hardship on the appellants and that they should be permitted to do so. A mere assertion without supporting evidence of the lack of financing ability certainly is insufficient for this Court to make a ruling thereon. No authority has been found by the appellee in support of this position and there is no citation of such authority under the rule. Regardless of this, however, it is felt that in order for this Court to be able to sustain such an ex parte motion, there should be supportive evidence of the financial hardship on the part of an appellant before any such ruling should be issued by this Court.

The appellee further moves this Court to strike from the

record of the Supreme Court of Kentucky the petition for rehearing by appellants. The appellee has received from the office of the Clerk of the Supreme Court of Kentucky a receipt notice of the ex parte motion. However, we have not received any receipt notice from the Clerk of the petition for rehearing and I would assume therefrom that the petition for rehearing has not been docketed with the Supreme Court. However, out of an ounce of caution, the appellee feels that this petition for rehearing should be stricken from the record and not filed on the grounds that it is not proper under the rules of the Court of Appeals and that the petition for rehearing is not the proper method for attacking a previous ruling of this Court on a motion.

Pursuant to rule 1.170 of the rules of the Kentucky Supreme Court, for the limited purpose of this motion, attached herewith and hereto are certified copies of those portions of the record necessary for this Court to decide the merits of this motion, namely:

1. Notice of Motion filed by the defendant-appellee in the Kenton Circuit Court, Fourth Division, certified as being mailed on the 18th day of February, 1976, to the plaintiffs-appellants' counsel and noticed for hearing on the 23rd day of February, 1976, at 9:30 a.m. in the Kenton Circuit Courtroom, Fourth Division.

2. The Court's order pursuant to said motion, certified as having been mailed on the 23rd day of February, 1976, to plaintiffs-appellants' counsel and entered by the Judge of that Court.

MEMORANDUM

The Supreme Court of Kentucky issued an order denying the motion to abate and dismissing the appeal. This

order was entered on February 3, 1976, and signed by Scott Reed as Chief Justice.

Subsequent to this, as pointed out in the memorandum filed on behalf of this appellee in the Supreme Court of Kentucky in conjunction with a motion to dismiss the appeal, it was pointed out to this Court that the appellants filed a notice of appeal to the Supreme Court of Kentucky from the order of the Kenton Circuit Court overruling the motion of the appellants to correct a typographical error in the original notice of appeal.

In conjunction therewith and following the receipt of the notice of appeal filed on behalf of the appellants, the appellee filed a motion with the Kenton Circuit Court, Fourth Division, a copy of which is enclosed with this moton and is self-explanatory. Subsequently a hearing was held in the Kenton Circuit Courtroom and the Honorable James J. Gilliece, Judge presiding, sustained all of the motions of the appellee which noted the filing of the order of the Supreme Court; ordered that the appellants shall pay all costs of the matter and any costs incurred and that a rule should issue by the Court directing payment if payment of the costs was not made within ten (10) days of the ruling by the Court; that the cost of the matter from the date of judgment up to and including the motion be paid by the plaintiffs-appellants and further, that the order of the Supreme Court of Kentucky entered on February 3, 1976, adjudicated all matters in controversy by and between the parties and that the notice of appeal filed by the plaintiffs-appellants had no merit and was therefore dismissed and stricken from the record.

Now, the plaintiffs-appellants have filed with this Court a petition for rehearing which I assume has not been filed since I have not received any notice from the Clerk of the

Court that such petition has been filed. However, it was felt that comment should be made on the petition for rehearing for it is totally without merit and foundation. The rules of the Supreme Court of Kentucky, specifically 1.350, provides that a party adversely affected by an opinion in an appealed case may petition to the Court for (1) a rehearing, or (2) a modification or extension of the opinion, or both, and the opposing party may file a response thereto.

From the above rule, it is obvious that it is not anticipated that a petition for rehearing shall be filed until and unless there has been a hearing on the merits of the case, briefs have been filed by all parties, and the Court has considered the arguments of counsel in their briefs and then issued its judgment. The rule itself anticipates that an opinion of the Court be rendered. In the subject case, we are not concerned with an appeal that has been heard on the merits, but rather a dismissal of the appeal by the appellants based upon his failure to satisfy jurisdictional requirements laid down by this Court in a long line of cases previously cited by this appellee in his original motion to dismiss the appeal, which motion was sustained by this Court. A motion for reconsideration of that order may be the proper method for attacking the order of the Court. However, there is no provision in the rules of this Court for a petition for rehearing from an order by the Court dismissing the appeal for failure to satisfy jurisdictional requirements and perfecting such an appeal.

Subsection (B) of Rule 1.350 further provides that a petition for rehearing shall be limited to consideration of the issues argued on appeal and *will be granted only when it appears that the Court has overlooked a material fact in the record or a controlling statute or a decision, or has misconceived the issues presented on appeal or the law*

applicable thereto. In the subject case, this Court has properly considered all issues attendant to the original dismissal of this appeal. The Court did not overlook any applicable statutes, authority or controlling decisions. Therefore, the petition for rehearing has absolutely no merit at all and should be stricken from the record of the Supreme Court of Kentucky.

Secondly, the arguments of counsel in the petition for rehearing that he filed, have absolutely no merit whatsoever. The first argument of counsel concerns itself with the argument that there never was a formal docketing of the appeal for a decision by this Court. Civil Rule 75.10 specifically provides that if prior to the time the record on appeal is filed in the Court of Appeals, a party desires to docket the appeal in order to make in the Court of Appeals a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the Clerk of the Circuit Court at his request shall certify and transmit to the Court of Appeals a copy of such portion of the record of proceedings below as is needed for that purpose. It is obvious from that rule that there is and was a valid docketing of the appeal for the purpose of deciding the motion to dismiss by filing the certified copies as required by rule 75.10 and the rule of the Supreme Court of Kentucky, 1.170. There, therefore, was a valid docketing of the matters necessary for this Court to decide the appeal and the first argument of the appellants has absolutely no merit.

Appellants in their second argument attempt to argue that there has been a violation of the United States Constitution regarding strict compliance of the rules and the entry of this order by the Court. The cases as cited by the appellants do not apply to jurisdictional requirements

of a Court in perfecting an appeal and have no applicability whatsoever. Appellants merely failed to satisfy the jurisdictional requirements of this Court and therefore the second argument likewise failed.

The third argument asserted by appellants is totally without foundation, fallacious and a direct insult to the intelligence of this Court. It is very difficult for counsel for the appellee to believe that any attorney can assert to this Court that he should not be required to follow the rules and to research the law relative to those rules and in support of those rules or to say it another way, to do the job that an attorney is supposed to do. This argument is so fallacious that it leaves counsel for the appellee in a position of quandary as to how you reply to something that is so ignorant.

The arguments of counsel for the appellants must fail and the attempts by the counsel for the appellants and the efforts made on his behalf are causing the appellee substantial cost, expense and time in answering all of the various things done by counsel for the appellants. There has been no violation of the rights of the appellants. As a matter of fact, all of her rights have been properly protected by this Court and by the Kenton Circuit Court, Fourth Division, Honorable James J. Gilliece presiding. We therefore request that this Court enter the proper orders finalizing this matter once and for all, dismissing the appeals filed by the appellants. It is respectfully submitted that the Supreme Court of Kentucky hereby dismiss the appeal filed by the appellants, striking from the record all of the petitions for rehearing, motions for ex parte orders and other items filed by the appellants. It is further respectfully requested that this Court also order that all costs attendant to this matter be paid by the appel-

lants, and that the appellee be reimbursed for costs unnecessarily expended in this matter.

Respectfully submitted,

/s/ JAMES G. OSBORNE

O'HARA, RUBERG, CETRULO AND OSBORNE

P.O. Box 187

600 Greenup Street

Covington, Kentucky 41012

Attorney for appellee

[CERTIFICATION OMITTED]

SUPREME COURT OF KENTUCKY

CIVIL ACTION No. 27663

ELSIE OAKLEY, INDIVIDUALLY and as next friend of ROBERT OAKLEY, A MINOR,

Appellant,

vs.

ROGER (BOB) KNEFF,

Appellee.

Appeal From Kenton Circuit Court
Honorable James J. Gilliece, Judge

ORDER DENYING MOTION FOR REHEARING – DENYING MOTION TO FILE XEROX COPIES IN LIEU OF PRINTED BRIEF AND GRANTING MOTION TO DISMISS APPEAL

The appellant's motion for rehearing of the order dismissing appeal is denied.

The motion of appellant to file Xerox copies in lieu of printed briefs is denied as moot since the appeal has been dismissed.

On the appellee's motion the appeal to this Court from the order of the Kenton Circuit Court filed January 27, 1976, overruling a motion to correct a typographical error is dismissed.

Clayton, Jones, Lukowsky and Stephenson, JJ., sitting.

All concur:

Entered March 17, 1976.

/s/ SCOTT REED
Chief Justice

SUPREME COURT OF KENTUCKY

NO DOCKET NUMBER

ELSIE OAKLEY, INDIVIDUALLY, AND AS
NEXT FRIEND OF ROBERT OAKLEY, A MINOR,
Appellants,

vs.

ROGER (BOB) KNEFF,
Appellee.

NOTICE OF REVIEW BY THE SUPREME COURT OF THE UNITED STATES AND REQUEST FOR CERTIFICATION OF RECORD UNDER RULE 21 (1) OF SAID COURT

(Filed April 12, 1976)

Appellants, Elsie Oakley, Individually, and as next friend of Robert Oakley, a minor, are invoking the jurisdiction

of the Supreme Court of the United States under Title 28, United States Code, Section 1257 (3) to review the judgment entered herein on February 3, 1976 in this Court dismissing the appeal of these Appellants, and whose Petition for Rehearing was also denied by this Court on March 17, 1976.

The Clerk of the Supreme Court of Kentucky is instructed by the Appellants to certify the ENTIRE RECORD of this Court under Rule 21 (1) of the Supreme Court of the United States, and to transmit it to the Clerk of the Supreme Court of the United States, Supreme Court Building, Washington, D. C., at cost of these Appellants.

/s/ STUARD WEGENER
Counsel for Appellants

827 Wesley Drive,
Villa Hills, Ky. 41016

[RECEIPT OF SERVICE OMITTED]

STATUTES

Constitution of the United States:

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ARTICLE 6

[Assumption of public debt—Supreme law—Oath of office—Religious tests prohibited.]—[1.] All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

[2.] This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

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AMENDMENT 14

§ 1. **[Citizenship—Due process of law—Equal protection.]**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Kentucky:

§ 14. **Right of judicial remedy for injury—Speedy trial.**—All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Kentucky Revised Statutes:

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446.080. Liberal construction — Statutes not retroactive — Common usage — Technical terms. — (1) All statutes of this shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.

(2) There shall be no difference in the construction of civil, penal and criminal statutes.

(3) No statute shall be construed to be retroactive, unless expre ly so declared.

(4) All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning. (459, 460.)

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447.151. Court of Appeals to promulgate Rules of Civil Procedure. — The Court of Appeals, by rules promulgated from time to time, shall regulate pleading, practice, proce-

dure and the forms thereof in all civil proceedings in all courts of the state, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge or modify the substantive rights of any litigant. (Enact. Acts 1952, ch. 18, § 1; 1968, ch. 152, § 165.)

Kentucky Rules of Civil Procedure:

Rule 1. Scope of rules.—These rules govern the procedure and practice in all courts of this state, except original actions in the Court of Appeals, in all actions of a civil nature whether cognizable as cases at law or in equity, with the exception that they do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

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Rule 8.06. Construction of pleadings.—All pleadings shall be so construed as to do substantial justice.

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Rule 60.02. Relief by motion on grounds of mistake, newly discovered evidence, fraud, etc.—On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (1) mistake, inadvertence, surprise or excusable neglect; (2) * * *

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Rule 60.04. When appeal pending.—If a proceeding by motion or independent action is commenced under Rule 60.02 or 60.03 while an appeal is pending from the original judgment in the Court of Appeals and prior to the time an opinion is rendered, the party commencing such proceeding shall promptly move the Court of Appeals to abate the appeal until a final order is entered therein. When the trial court has entered such final order, the party who moved for abatement shall promptly file with the clerk of the Court of Appeals a certified copy thereof.

The obvious reason for requiring a movant under this section to notify the Court of Appeals is to let the court know that the motion is pending so it will not take further steps until the motion is adjudicated in a lower court. Board of Trustees v. Nuckolls (1972), 481 S. W. (2d) 36.

2. Application.

Where notice of appeal was filed, a motion pursuant to this section would not have upset the procedure in the Court of Appeals to any extent, therefore, it was not necessary for the movant to ask the Court of Appeals to abate the appeal until a final order was entered in the circuit court. Board of Trustees v. Nuckolls (1972), 481 S. W. (2d) 36.

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Rule 54.01. Definition and construction.—A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment in a final order adjudicating all the rights of all the

parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order."

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Rule 73.03. Notice of appeal.—The notice of appeal shall specify the parties taking the appeal, and shall designate the judgment or part thereof appealed from.

Compiler's Note. This rule is based on Federal Rule 73 (b).

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75.10
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Rule 75.10. Record for preliminary hearing in the Court of Appeals.—If, prior to the time the record on appeal is filed in the Court of Appeals, a party desires to docket the appeal in order to make in the Court of Appeals a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the circuit court at his request shall certify and transmit to the Court of Appeals a copy of such portion of the record of proceedings below as is needed for that purpose.

Compiler's Note. This rule is substantially the same as Federal Rule 75 (j).

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Rule 82. Jurisdiction and venue unaffected.—These rules shall not be construed to extend or limit the jurisdic-

tion of any court of this commonwealth or the venue of actions therein.

Rules of the Supreme Court of Kentucky:

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Rule 1.070. Original appeals.—(a) To perfect an original civil or criminal appeal the appellant shall (1) cause the record on appeal to be filed, (2) pay the tax required by KRS 142.011 (1), and (3) file the statement of appeal required by RCA 1.090. In civil cases the appellant shall also file the bond on appeal required by CR 73.05. In criminal cases, when required by KRS 21.140 (2), the appellant shall also file a motion for appeal.

(b) When an original appeal has been perfected and entered in the docket book, the clerk shall forthwith mail notice of the date of such entry to the attorneys for the parties as shown on the statement of appeal required by RCA 1.090.

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Rule 1.170. Motions for intermediate orders.—No motion for an intermediate order under CR 75.10 or RCr 12.62 shall be entertained until the movant has filed in this court a certified copy of the judgment appealed from and of the notice of appeal, and a copy of such portion of the record or proceedings below as is needed for the purpose of the motion. (Amendment to RCA 1.170 effective May 1, 1968.)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1783

ELSIE OAKLEY, Individually and as Next Friend of Robert Oakley, a Minor Under the Age of 14 Years - - - - Petitioners

versus

ROGER (BOB) KNEFF - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1783

ELSIE OAKLEY, Individually and as Next Friend of Robert Oakley, a Minor Under the Age of 14 Years - - *Petitioners*

v.

ROGER (BOB) KNEFF - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The respondent, Roger (Bob) Kneff, by and through his attorney, hereby respectfully requests that this Court deny the petitioners' Writ of Certiorari to review the judgment of the Supreme Court of the Commonwealth of Kentucky entered in this cause of February 3, 1976.

JURISDICTION

The petitioners herein assert that the judgment of this Court is invoked under 28 U.S.C. Section 1257(3). The respondent asserts that this Court is without jurisdiction on the grounds that the petitioners have not asserted that a State Court has decided a Federal ques-

tion of substance and cannot so state, for the contrary is true. Nor have the petitioners met the requirements of 28 U.S.C. Section 1257(3) on the grounds that the validity of a treaty or statute of the United States has not been drawn in question, nor has the validity of a State statute been drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, nor has any title, right, privilege of immunity been specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States. This Court is therefore without jurisdiction to entertain the matter in question as raised by the petitioners for Writ of Certiorari.

CONSTITUTIONS AND STATUTES INVOLVED

The respondent herein accepts the statement of the Constitution and statutes involved as set out in page 3 of the Petition for Writ of Certiorari, but specifically adds 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

The questions presented in the Petition for Writ of Certiorari are set out in said Petition at page 2 thereof. By the Rules of this Court, those questions may not be broadened nor may additional questions be raised. Therefore, the response to the Petition will be limited to those questions even though they are very ineptly drawn and very difficult to understand.

STATEMENT OF THE CASE

(Before beginning the statement of the case, for the purpose of reference to all citations of appropriate parts of the record, all of the record is contained in the appendix to the Petition for Writ of Certiorari and will be referred to hereafter in parenthesis by a simple reference to the letter "A" and the numbers following, of course, will be the page number.)

The petitioners have petitioned this Court for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky arising out of a trial that was held on Thursday, November 6, 1975, and continued on over until the 7th day of November, 1975. A directed verdict was granted to the defendant in the trial court below and the respondent herein, and a Trial Order and Judgment was entered pursuant to the Court's ruling that a directed verdict was proper (A. 3a-5a). This Trial Order and Judgment was filed as a matter of record on November 14, 1975. Subsequently, on November 24, 1975, the trial court below entered an Order overruling a motion and grounds for new trial filed by the plaintiffs below and the petitioners in this Court (A. 6a).

Subsequently, on the 28th day of November, 1975, the petitioners herein filed in the trial court below a Notice of Appeal to the then Court of Appeals of Kentucky, which is now designated the Supreme Court of Kentucky (A. 7a). It is to be noted at this point that the petitioners in that Notice of Appeal, appealed from the final Order of the trial court entered on November

24, 1975, *"wherein this Court overruled the motion and grounds for a new trial filed herein by plaintiffs and is basing their appeal upon the grounds as stated in said motion and grounds for a new trial."*

On the 12th day of January, 1976, the respondent herein filed in the Supreme Court of the Commonwealth of Kentucky, a motion to dismiss the appeal and cited the authorities in support thereof (A. 1a-2a).

The petitioners herein filed a motion to abate under Rule 60.04 in the Supreme Court of Kentucky and then in the trial court filed a motion for leave to correct a typographical error in the Notice of Appeal under Civil Rule 60.02(1), prior to docketing in the Court of Appeals (A. 8a, 9a). A response was then filed on behalf of the respondent herein to the petitioners' motion to abate (A. 11a-12a-13a). Additionally, the respondent in the trial court below filed a reply to the motion for leave to correct a typographical error in the Notice of Appeal (A. 14a-15a). It is obvious from the reply and from the pleadings that have been filed that there was no typographical error to correct and the grounds therefore are completely and adequately set out in the reply to the motion for leave to correct a typographical error (A. 14a). An Order was then entered denying the plaintiffs' motion to correct a typographical error (A. 17a), and a motion was filed on behalf of the respondent in the Supreme Court of Kentucky requesting that the Order be noted and further moving that the Supreme Court of Kentucky rule on the motion of the respondent in the Supreme Court of Kentucky and that the appeal be dismissed (A. 16a). The Supreme Court of Kentucky on February 3, 1976, then entered an order denying the motion of the petitioners herein to abate and sustained the motion of the respondent herein to dismiss the appeal (A. 22a).

Following this, the petitioners herein then filed a Notice of Appeal to the Supreme Court of Kentucky from the Order of the trial court denying the motion of the petitioners to correct a typographical error in their original Notice of Appeal (A. 28a). The respondent herein then filed a motion to dismiss that appeal in the Supreme Court of Kentucky (A. 23a-26a).

Following this, the petitioners then filed an ex parte motion for leave to file xerox copies in lieu of printed under R.C.A. 1.200(E) and additionally filed a Petition for Rehearing (A. 29a-36a), following which the respondent herein then filed an Objection to Ex Parte Motion for Leave to File Xerox Copies and a motion to strike the Petition for Rehearing by the petitioners, and a supplemental memorandum in support (A. 38a-44a). The Supreme Court of Kentucky then entered an Order denying the motion for rehearing, denying the motion to file xerox copies in lieu of printed brief and granting the motion of the respondent to dismiss the appeal (A. 45a-46a). It is interesting to note at this particular point that the reference of the petitioners herein to the Supreme Court of Kentucky declaring the Petition for Rehearing as being moot, is not a proper nor a correct statement of the Order of the Supreme Court of Kentucky. The only thing declared moot by the Supreme Court of Kentucky was the mo-

tion of the appellants to file xerox copies in lieu of printed briefs (A. 45a-46a).

At any rate, this Petition for Writ of Certiorari to the Supreme Court of Kentucky filed in the Supreme Court of the United States is from that Order of February 3, 1976 (A. 22a) and is not a Petition for Writ of Certiorari from that Order dismissing the second appeal by the petitioners herein as entered by the Supreme Court of Kentucky on the 17th day of March, 1976 (A. 45a-46a). Therefore, this case now before the Supreme Court of the United States on the Petition for Writ of Certioari arises out of a directed verdict that was granted to the respondent very properly by the trial court of the Kenton Circuit Court and the subsequent attempts to appeal therefrom by the petitioners herein.

ARGUMENT

I.

The Case of *Foman* v. *Davis* Is Clearly Distinguishable and Therefore Inapplicable in This Instance.

The petitioners state that the case of *Foman* v. *Davis,* 371 U. S. 178, 83 S. Ct. 227 (1962), is applicable to this situation. In that case, the U. S. Supreme Court held that the Federal Court of Appeals of the First Circuit abused its discretion in too narrowly reading the second of the two Notices of Appeal before them in that they ignored the first Notice of Appeal altogether. It is to be borne in mind that the *Foman* case arises out of a decision of the United States District

Court for the District of Massachusetts and was on appeal to the First Circuit Court of Appeals of the United States and concerned a federal matter in its entirety. Although the second Notice of Appeal was inept, the two notices taken together, sufficiently projected petitioner's intention to seek review of both the dismissal and the denial of the motion. Such intent to appeal from the dismissal, final order, was manifest and did not mislead or prejudice the respondents, as both parties did brief and argued the merits of the earlier judgment on appeal. The failure of the Court of Appeals to recognize the manifest intention of the petitioner (in not looking at the two notices together) was considered a technicality used to defeat the spirit of the Federal Rules of Civil Procedure.

Furthermore, the two notices in *Foman, supra,* as construed together, pertain to an appeal from a final order, that is the judgment dated December 19, 1960. Herein lies the pertinent distinction from the present case at Bar. The present (Oakley) petitioners' Notice of Appeal specifically and clearly refers to "the final order of this Court *entered on November 24, 1975, wherein this Court overruled the motion and grounds for new trial filed herein by plaintiffs and is basing this appeal upon the grounds as stated in said motion and grounds for new trial.*" By any reasonable interpretation of the above quoted language, the petitioners are speaking of the order of the Kenton Circuit Court that overruled plaintiffs-petitioners' motion and grounds for new trial entered November 24, 1975, and such is

not an appeal from the Trial Order and Judgment entered on November 14, 1975.

The petitioners' Notice of Appeal as mentioned above therefore does not seek an appeal from a final order nor from an appealable judgment as required by K.R.C.P. 73.03 and defined in K.R.C.P. 54.01 since the Order of November 24th does not adjudicate all of the rights of the parties.

K.R.C.P. 73-03 clearly and unequivocally provides:

> "The notice of appeal shall . . . designate the judgment or part thereof appealed from."

In construction of this rule, the Supreme Court of Kentucky has uniformly held that strict compliance therewith is required. *Hawks* v. *Wilbert,* Ky., 355 S. W. 2d 655 (1962); *Hopkins* v. *Hillard,* Ky., 444 S. W. 2d 130 (1969); *United Mine Workers of America, Dist. No. 23* v. *Morris,* Ky., 307 S. W. 2d 763 (1957); *Rose Bowl Lanes, Inc.* v. *City of Louisville,* Ky., 373 S. W. 2d 157 (1963); *T.I.M.E.—D.C., Inc.* v. *Bond,* Ky. 495 S. W. 2d 500 (1973); *Commonwealth* v. *Black,* Ky., 329 S. W. 2d 192 (1959); and *City of Louisville* v. *Christian Business Women's Club, Inc.,* Ky., 306 S. W. 2d 274 (1957); *McFerran* v. *Postal Services, Inc.,* Ky., 402 S. W. 2d 83 (1966).

In all of the above cited cases, the requirement of strict compliance with the Civil Rule is jurisdictional in nature and therefore the failure to properly so comply with the Rule dictates that the appeal be dismissed. Pursuant to the above cited authorities in the Commonwealth of Kentucky this petitioners' appeal was defi-

cient on the grounds that the Notice of Appeal failed to designate an appealable order as defined in K.R.C.P. 54.01 rendering such Notice of Appeal fatally defective and the petitioners in their attempts in the Supreme Court of Kentucky to appeal the judgment of the trial court, failed to meet the jurisdictional requirements of the Supreme Court of the Commonwealth of Kentucky. The failure of the petitioners to meet or satisfy these jurisdictional requirements laid down by the Kentucky Supreme Court, can hardly be considered as technicalities as claimed by these petitioners and therefore the doctrine of the *Foman* v. *Davis* case is inapplicable under the present facts.

In the case of *Hawks* v. *Wilbert, supra,* the then Court of Appeals of the Commonwealth of Kentucky stated at page 656 of that opinion:

> "In considering this and similar failures of counsel to follow the rules of appellate practice, the Court is confronted with many hard decisions. The choice presented is whether it is better to adhere strictly to the rules with some seemingly harsh decisions resulting, or to permit a substantial compliance when no prejudice is shown to have been occasioned by the dereliction. This problem has plagued the Court many times. However, rather than having to decide whether each dereliction is prejudicial, the Court had adopted the policy of strict compliance in the belief that the legal profession should by now be adequately informed on these rules. The necessity of strict compliance and the supporting reasons have been thoroughly discussed in the White case and in United Mine Workers of America, Dist. No. 23 v. Morris, Ky., 307 S. W. 2d

763, also decided December 5, 1957. See also Electric Plant Board v. Stephens, Ky., 273 S. W. 2d 817; Commonwealth v. Black, Ky., 329 S. W. 2d 192. Hence, the Court feels there is no reason to discuss the matter further or to depart from its policy of strict compliance.

The motion to dismiss the appeal is sustained, and the appeal is dismissed."

In the case of *United Mine Workers of America, Dist. No. 23* v. *Morris, supra,* the Court of Appeals stated at page 765 of that opinion:

> "We cannot say that rules regulating appeal procedure are mere technicalities to be enforced or relaxed upon the whim of this Court. Such rules have the force of law."

Further, at page 765 of that same opinion the Court stated:

> "Judicial administration is dependent upon procedural rules. Without a definitive method of procedure a court cannot function effectively, nor would citizens have the equal protection of the law."

This Court's attention is also called to the further very logical reasoning of the then Court of Appeals of the Commonwealth of Kentucky in deciding the issues contained in that appeal.

In the further case of *Rose Bowl Lanes* v. *City of Louisville, supra,* at page 158 of that opinion in which the appellant in that case failed to designate the judg-

ment or part thereof appealed from in his Notice of Appeal, the Court of Appeals stated:

> "Such omission on the part of the appellant seems a trifle on which to base the dismissal of an appeal, but on the other hand, it is such a simple thing to designate the judgment or part thereof appealed from as to make the failure to do so inexcusable. Fairness to those against whom the rule has been enforced strictly strengthens our resolve to retain the policy of strict compliance."

In addition to the above cited Kentucky authorities, there are also Federal authorities that have dealt with similar situations. In the case of *Higginson* v. *United States* (U.S.C.A., Sixth Circuit), 384 F. 2d 504 (1967), the Sixth Circuit Court of Appeals has before it a case involving jurisdictional requirements and had occasion to comment upon the *Foman* case, *supra.* In distinguishing that case, the Sixth Circuit Court of Appeals stated at page 510 of that opinion:

> "No such situation existed in the present case and the precise quotation of two inappropriate orders and the total omission of the critical third can scarcely be characterized as being merely 'inept.' Similarly, we recognize and are totally in accord with the portion of Foman opining that it is 'entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of * * * mere technicalities,' *but in contradistinction reiterate that we are here dealing with a jurisdictional requirement.*" (Emphasis supplied.)

Further, in the case of *Thompson* v. *Immigration and Naturalization Service* (U.S.C.A., Seventh Circuit), 318 F. 2d 681 (1963), the Seventh Circuit Court of Appeals interpreted the *Foman* case and found it to be clearly distinguishable. In that case at page 684 the Seventh Circuit Court of Appeals stated:

> "In the instant case the notice of appeal was not timely filed as were the notices of appeal in Foman, and this Court has no jurisdiction to determine this appeal on the merits. Furthermore, in the instant case the sufficiency of appellant's petition for naturalization was never involved, and Rule 15(a) is not applicable. Foman is simply not in point here."

In still a further case, *Fisher* v. *Indiana Lumberman's Mutual Insurance Company* (U.S.C.A., Fifth Circuit), 456 F. 2d 1396 (1972), again the case of *Foman* v. *Davis* was clearly distinguished. In the case of *Troxel Manufacturing Company* v. *Schwinn Bicycle Company* (U.S. C.A., Sixth Circuit), 489 F. 2d 968 (1973), the Sixth Circuit Court of Appeals again clearly distinguished the *Foman,* case. See also *Suehle* v. *Markem Machine Company* (U.S.D.C. E.D. Pa.), 38 F.R.D. 69 (1965).

Therefore, the situation that exists in the case at bar is one in which the petitioners herein have very clearly failed to meet the jurisdictional requirements as laid down by the Commonwealth of Kentucky Supreme Court. Their failure to do so, very clearly justified a dismissal of the appeal. It is equally clear that there have been no violations of the rights of the plaintiffs-appellants-petitioners herein on the grounds of

unequal protection under the law, but that the contrary is true. The equal rights under the law are very clearly protected by an equal enforcement of the law as to all parties.

II.

This Court Is Without Jurisdiction to Entertain the Within Cause.

As pointed out previously under the subject head of "jurisdiction," this Court is without the necessary statutory requirements in order to be able to entertain this particular cause. In addition to that, this Court has repeatedly held that where a Petition for Writ of Certiorari is sought from a judgment of a State Court, and that State Court judgment is in reliance upon non-Federal grounds, then the Supreme Court is without jurisdiction to entertain the matter. See *Durley* v. *Mayo,* 351 U. S. 277, 76 Supreme Court Reporter 806 (1956); *Stembridge* v. *State of Georgia,* 343 U. S. 541, 72 Supreme Court Reporter 834 (1952).

In the *Durley* case, *supra,* the Supreme Court of the United States held that in order for a petitioner to establish jurisdiction, he must demonstrate that neither of the State grounds relied upon by the lower court of Florida in that particular case can account for the decision of that lower court. And, further held, and I quote from the opinion at page 809:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." Citing the *Stembridge* case, *supra.*

Further, at that same page of the *Durley* opinion, this Court stated:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 476; Lynch v. [People of] New York [ex rel. Pierson], 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. [State of] Missouri, 13 Wall. 257, 263, 20 L. Ed. 635; [Walter A.] Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293, 297, 11 S. Ct. 528, 530, 35 L. Ed. 193; Allen v. Arguimbau, 198 U. S. 149, 154-155, 25 S. Ct. 622, 624, 49 L. Ed. 990; Lynch v. [People of] New York [ex rel. Pierson] supra."

In the instant case we have a defective Notice of Appeal filed on behalf of the petitioners. The lower court decided that this Notice of Appeal was defective because it did not face the strict compliance requirement of the Supreme Court of Kentucky as we have set out above. These petitioners are petitioning this Court for a Writ of Certiorari arising out of that order denying their motion to abate and dismissing the appeal, said order being dated February 3, 1976 (A. 22a).

The only time that any Federal question was even presented was in the Petition for Rehearing filed on behalf of these petitioners in the Supreme Court of Kentucky below (A. 30a-36a). Since this is an appeal from that order of February 3, 1976, obviously the decision of the Supreme Court of Kentucky cannot and was not in reliance upon any Federal question whatsoever, but was rather in reliance upon the strict compliance requirement of the Supreme Court of Kentucky requiring all people filing a Notice of Appeal in that Court to strictly comply with Rule 73.03 and the cases cited thereunder. This respondent by no means is admitting that a Federal question has been raised by that Petition for Rehearing filed by the appellants in the Supreme Court of Kentucky. As a matter of fact, I think that if this Court were to review that Petition for Rehearing as it is constituted, you will see that no real Federal issue was ever raised prior to the decision, of course, of February 3, 1976, but even in the Petition for Rehearing, no Federal question was raised, as it was merely a very inept attempt on the part of petitioners' attorney to try to assert something new into this particular law suit. But, the issue was as a matter of fact quite moot since the order appealed from is one in which there was never an issue concerning a Federal question whatsoever. Therefore, this Court is totally without jurisdiction to entertain the within matter.

CONCLUSION

It is therefore respectfully requested that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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